Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

October Term, 1996

WILLIAM H. DIXON and ROGER L. NORWOOD

Petitioner,

vs.

UNITED STATES OF AMERICAN

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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January 22, 1995

31 pp

QUESTIONS PRESENTED

1. Certiorari should be granted to determine the strict statutory construction of State Law and Federal Law; their interrelationship in determining whether a veteran is liable for a deficiency to the Veterans Administration (VA) for alleged lost by VA on a defaulted loan under VA Home Loan Guarantee. At issue are the laws of the State of Oklahoma as to deficiency judgment on real property and the Federal Law as to VA loans. The following subquestions are included:

   A. Certiorari should be granted to outline under what circumstances the right to recovery by the VA is controlled by subrogation and/or indemnification against the veteran.

   B. Certiorari should be granted to determine if a State Law providing for a mortgage holder which fails to obtain a deficiency judgment; the mortgage holder then demands from and receives from the VA funds as an alleged lost to be paid under the VA Guarantee Agreement; by State Law the amount received has satisfied the debt and no further action/demand can be maintain against the veteran.

   C. Certiorari should be granted to

settle the conflict between bankruptcy law discharging a debt and the VA requiring the debt to be paid before reinstatement of benefits for the amount discharged in bankruptcy when the VA received notice of the bankruptcy.

LIST OF PARTIES

Roger L. Norwood and William H. Dixon were Plaintiffs below as individuals and as the lead Plaintiffs for a class-action. All parties agreed to not attempt to certify the class until the base case had been determined on the merits. The United States of America on behalf of Department of the Veterans Administration was the Defendant below.

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PETITION FOR A WRIT OF CERTIORARI

William H. Dixon and Roger L. Norman respectfully petitions for a writ of certiorari to review the opinion of the Oklahoma Supreme Court in this case.

OPINIONS BELOW

On October 23, 1995 the Tenth Circuit Court of Appeals entered an opinion affirming in part and modifying in part the Order entered by the United States District Court for the Western District of Oklahoma on October 12, 1994 granting Summary Judgment to the Defendant, Veterans Administration.

JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Tenth Circuit filed on October 23, 1995. That Opinion affirmed in part and modified in part the lower court's Order filed October 12, 1994 granting Summary Judgment to the Defendant, Veterans Administration. Certiorari jurisdiction is invoked pursuant to and conferred on this Court by 28 USC § 1254(1).

STATUTORY PROVISION INVOLVED

12 O.S. § 686:

> Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety (90) days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared by such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date s there shall have been any market value thereof and shall make an order directing the entry of a

deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus costs and disbursements of the action plus the amount owing on all prior liens and encumbrances with interest, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction f the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

38 CRF § 36.4323(a)(b)(c)(e)

(a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty or on account of an insured loss, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full maount payable under the contract with the debtor. No partial or complete release by a creditor shall impair the rights of the Secretary with respect to the debtor's obigation.

(b) The holder, upon request, shall execute, acknowledge and deliver an appropriate instrument tendered for that purpose, evidencing any payment received from the Secretary and the Secretary's resulting right of subrogation.

(c) The Secretary shall cause the instrument required by paragraph (b) of this section to be filed for record in the office of the recorder of deeds, or other appropriate office of the proper county, town or state, in accordance with the applicable State law. The filing or failure to file such instrument for record shall have the legal results prescribed by the applicable law of the State where the real or personal property is situated, with respect to filing or failure to so file mortgages and other lien instruments and assignments thereof.

The references herein to "filing for record" include "registration" or any similar transaction, by whatever name designated when title to the encumbered proerty has been "registered" pursuant to a Torrens or other simiar title registration system provided by law.

(e) Any amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran.

38 CRF § 36.4324(f)

(f) The release of the personal liability of any obligor on a guranteed or insured obligation resultant from the act or omission of any holder without the prior approval of the Secretary shall release the obligation of the Secretary as guarantor or insurer, except when such act or omission consists of (1) failure to establish the debt as a valid claim against the assets of the estate of any deceased obligor, provided no lien for the guaranteed or insured debt is thereby impaired or destroyed; or (2) an election and appropriate prosecution of legally availabel effective remedies with respect to the repossession or the liquidation of the security in any case,irrespective of the identity or the survival of the original or of any subseuqnet debtor, if holder shall have given such notice as reuqired by §36.4317 of this part and

if, after receiving such notice, the Secretary shall have failed to notify the holder within 15 days to proceed in such manner as to effectively preserve the personal liability of the parties liable, or such of them as the Secretary indicates in such notice to the holder; or (3) the release of an obligor, or obligors, from liability on an obligation secured by a lien on property, which release is an incident of and contemporaneous with the sale of such property to an eligible veteran who assumed such obligation, which assumed obligation is guaranteed on the assuming veteran's account pursuant to 38 U.S.C. chapter 37; or (4) the release of an obligor or obligors as provided in §36.4314(d) of this part; or, the release of an obligor, or obligors, incident to the sale of property securing the loan which the holder is authorized to approve under the provisions of 38 U.S.C. 3714.

38 CRF § 36.4317

Except upon the express waiver of the Secretary, aholder shall not begin proceedings in court or give notice of sale under power of sale, or otherwise take steps to terminate the debtor's rights in the security

util the expiration of 30 days after delivery by registered mail to the Secretary of a notice of intention to take such action: Provided, That

(a) Immediae action as reuiqred under 38 CFR 36.4346(i), may be taken if the property to be affected thereby has been abandoned by the debtor or has been or may be otherwise subjected to extraordinary waste or hazard, or if there exist conditions justifying the appointment of a receiver for the property (without reference to any contractual provisions for such appointment);

(b) Any rith of a holder to repossess personal property may be exercised without prior notice to the secretary; but notice of any such action taken shall be given by certified mail to the Secretary within ten days thereafter; and

(c) The notice required under this paragraph shall also be provided to the original veteran-borrower and any other liable obligors by certified mail within 30 days after such notice is provided to the Secretary in all cases in which the current owner of the property is not the original veteran-borrower. A failure by

the holder tomake a good faith effort to comply with the provisions of this subparagraph may result in a partial or total loss of guaranty or insurance pursuant to VA Regulation 36.4325(b), but such failure shall not constitute a defense to any lega action to terminate the loan. A good faith effort will include, but is not limited to:

(1) A search of the holder's automated and physical loan record systems to identify the name and current or last known address of the original veteran and any other liable obligors;

(2) A search of the holder's automated and physical loan record systems to identify sufficient information (e.g., Social Security Number) to perform a routine trace inquiry through a major consumer credit bureau;

(3) Conducting the trace inquiry using an in-house credit reporting terminal;

(4) Obtaining the results of the inquiry;

(5) Mailing the required notices and concurrentlyproviding the Secretary with the names and addresses of all obligors

identified and sent notice; and,

(6) Documentation of the holder's records.

11 USC § 524(a)(2)

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge or such debt is waived; and

STATEMENT

This case involves veterans who purchased homes under the Veterans Administration (hereinafter called VA) Home Loan Guarantee Programs.

The mortgages on the homes of the veterans went into default and were foreclosed upon by judicial proceedings in the State of Oklahoma. The VA sent letters to the mortgage holder directing that personal liability under the note and mortgage be preserved. The mortgage companies, through their respective attorneys, notified the VA that it had ninety (90) days after the Sheriff's Sale in which, under Oklahoma Law, to seek a deficiency judgment for the veteran to be personally liable for any deficiency. A deficiency judgment was not sought. Petitioner, Roger Norwood, subsequent to

the foreclosure and more than ninety (90) days after Sheriff's Sale, filed a Chapter 7 Bankruptcy. The mortgage company and the Veterans Administration were named and given notice of the bankruptcy. Neither the mortgage company nor the Veterans Administration objected to the Roger Norwood, being discharged.

The Va paid funds to the mortgage companies pursuant to the loan guarantee. Then VA demanded that the veterans reimburse/payback the VA the funds it paid to the mortgage company.

The United States District Court for the Western District of Oklahoma held that the veterans had to pay to VA all funds it paid the mortgage company. The United States Court of Appeals for the Tenth Circuit affirmed all of the judgment in the lower court except it modified the judgment that the veteran who filed Chapter 7 Bankruptcy maintains VA benefits for the amount above that which was discharged in bankruptcy. Petitioner seeks review by this Court on Certiorari as to that portion of the judgment which was not modified.

REASONS FOR GRANTING THE WRIT

I.

1. Certiorari should be granted to determine the strict statutory construction of State Law and Federal Law; their interrelationship in determining whether a veteran is liable for a deficiency to the Veterans Administration (VA) for alleged lost by VA on a defaulted loan under VA Home Loan Guarantee. At issue are the laws of the State of Oklahoma as to deficiency judgment on real property and the Federal Law as to VA loans. The following subquestions are included:

   A. Certiorari should be granted to outline under what circumstances the right to recovery by the VA is controlled by subrogation and/or indemnification against the veteran.

   B. Certiorari should be granted to determine if a State Law providing for a mortgage holder which fails to obtain a deficiency judgment; the mortgage holder then demands from and receives from the VA funds as an alleged lost to be paid under the VA Guarantee Agreement; by State Law the amount received has satisfied the debt and no further action/demand can be maintain against the veteran.

C. Certiorari should be granted to settle the conflict between bankruptcy law discharging a debt and the VA requiring the debt to be paid before reinstatement of benefits for the amount discharged in bankruptcy when the VA received notice of the bankruptcy.

Many Circuits have attempted to construe the applicable state property law as to the affect of a deficiency judgment in conjunction with Federal Law to determine if a veteran is to reimburase VA for funds it has paid to a lender. Many Circuits have attempted to determine the rights of the VA and the veterans under the right of subrogation and right of indemification in applying that law which is strictly State law and that which is strictly Federal Law and the interrelationship thereof.

The District Court properly relied on VA regulations. However, the regulations were not entirely viewed in a strict manner.

In a recent Supreme Court decision, *United States v. Smith*, 499 U.S. 160, 11 S.Ct. 1180, 1185 (1991), the Court stated that if the statute did not specifically address the issue it would not be inferred to exist. Departmental Regulations are to be given the same effect as a legislative statute.

Therefore, unless the matter is specifically addressed within a statute or regulation it cannot be construed to

exist. Statute and regulations must be construed in a strict manner. If it is not mentioned within the body of the regulation it does not exist. If it is addressed then the regulation must be complied with by all parties.

In the VA regulations, there are certain courses of action the VA must take in order to effectively obtain a money judgment (debt owing), against the veteran. See 38 C.F.R. § 136.4323(b), (c). The VA has yet to obtain any such debt owing as prescribed by subsection (c). This must be done in accordance with State Law. Further, the failure to comply with subsection (c) will have the legal results as prescribed by State Law.

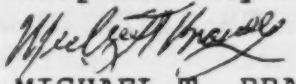
In the case at bar, the VA has not followed its own regulations in obtaining a debt owing to the VA, or the United States, as prescribed by subsection (c). Under the State Law the VA, in order to obtain a money judgment, must follow certain procedures. The VA has not done so. The VA has not followed its own regulations in this matter. Either, the VA must follow its own regulations or suffer the consequences of its own regulations. By the VA's own regulations, it has not followed the applicable law to obtain a "debt owing". State Law governs when money judgments are sought. The VA has not sought a money judgment under the law in Oklahoma, a deficiency judgment. Thus, the VA is barred from seeking monies from the Veteran, by its own regulation, and its own inactions.

CONCLUSION

This case involved the strict construction of State and Federal statutes as they relate to real property, deficiency judgment and Veterans Administration Home Loan Guarantee. The question affects every Circuit in which veteran that have purchased homes and have defaulted on the mortgage.

If strict statutory construction is used to construe the applicable laws of the State of Oklahoma and the Federal Government, judgments for the VA in this case at bar should be reversed.

Respectfully submitted,



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Appendix A
Filed October 23, 1995

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WILLIAM H. DIXON and ROGER L. NORWOOD,	)	
Plaintiffs-Appellants,	)	No. 94-6446
UNITED STATES OF AMERICAN,	)	
Defendant-Appellee,	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. NO. CIV-93-1924-W

Submitted on the briefs:

Michael T. Braswell, Oklahoma City, Oklahoma for Plaintiff, Appellants.

Mark B. Stern and Mark C. Niles Attorneys, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., for Defendant-Appellee.

Before BALDOCK, HOLLOWAY, and BRORBY, Circuit Judges.

HOLLOWAY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f) and 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

I.

Plaintiffs-appellants William H. Dixon and Roger L. Norwood are veterans who purchased homes using mortgages guaranteed through the Veterans Administration (VA) Home Loan Guaranty Program. The mortgages of both veterans went into default and were foreclosed upon through judicial proceedings in the State of Oklahoma. Neither of the lenders sought deficiency judgments against the veterans.

Pursuant to its guaranty, the VA paid Mr. Dixon's lender approximately $27,500 and established an administrative debt against him in that amount. See 38 C.F.R. §36.4323(e). A debt in the amount of $23,000 was established against Mr. Norwood after similar payment by the VA to his lender. Mr. Norwood later filed for relief under Chapter 7 of the Bankruptcy Code, and his debt to the VA was fully discharged. Nonetheless, the VA has refused to reinstate fully Mr. Norwood's eligibility to participate in the Guaranty Program.

Plaintiff veterans brought this action against the United States seeking to enjoin the collection of the debts owed

by them to the VA and to require the VA to reinstate fully their benefits under the Guaranty Program. Plaintiffs also sought certification of a class of similarly situated plaintiff. By counterclaim, the VA sought a money judgment against plaintiff Dixon for the amount of its loss under its guaranty agreement with his lender.

The district court granted summary judgment in favor of the United States. In so doing, the court ordered that judgment be entered against Mr. Dixon in the amount the VA had paid on his behalf plus interest, and further ordered that plaintiff Norwood's VA eligibility to participate in the Guaranty Program not be reinstated until the VA's loss on his loan is paid in full. See Appellants' App. at 133-34. These orders rendered it unnecessary issues. The Plaintiffs appealed. We turn to their appellate arguments.

II.

We review a grant of summary judgment de novo, applying the same legal standard as the district court. James v. Sears, Roebuck & Co., 21 F.3d 989, 997-98 (10th Cir. 1994). Thus, the judgment will be affirmed if there are no genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. Hagelin for President committee v. Graves, 25 F.3d 956, 959 (10th Cir. 1994), cert. denied, 115 S. Ct. 934 (1995).

Plaintiffs argue that their lenders'

failure to obtain deficiency judgments against them extinguished any further obligation they may have had to reimburse the VA. This is incorrect. We agree that if the lenders' rights to a deficiency judgment against the veterans fail, the VA's rights through subrogation fail as well. See United States v. Davis, 961 F.2d 603, 606 (7th Cir. 1992). However, the VA is not restricted solely to subrogation as a means of recovery. There are, in fact, two lines of potential recovery available to the VA against a veteran for whose benefit it has had to pay under a guaranty. Id. As noted above, under certain circumstances, the VA can be subrogated to the rights of the lender. 38 U.S.C. § 3732(a)(1). Because foreclosures must be done according to state law, Carter v. Derwinski, 987 F.2d 611, 612 (9th Cir.) (en banc) (citing 38 U.S.C. § 3720(a)(6)), cert. denied, 114 S. Ct. 78 (1993), the lenders here needed to have secured deficiency judgments under Oklahoma law to preserve rights against plaintiffs to which the VA could later be subrogated.[1] Because no deficiency judgments were obtained here, the VA has no subrogation rights against plaintiffs.

In the alternative, however, the VA has an independent contractual right of

---

[1] Under Oklahoma law there is a strict requirement that a motion for a deficiency judgment must be made within ninety days after a foreclosure sale or no right to recover any deficiency "shall exist." 12 Okla. Stat. § 686 (1991).

indemnity against plaintiffs. See Carter, 987 F.2d at 613 (quoting United States v. Shimer, 367 U.S. 374, 387 (1961)). This right is entirely separate from the subrogation right and fully enforceable "[r]egardless of the method by which a lender proceeds against a defaulting veteran . . . ." Id. at 616. "[T]he VA always possesses a right of indemnity against the veterans for the amount of guarantee paid to the lender." Id. Thus, while adherence to Oklahoma law governing post-foreclosure personal liability would have been crucial had the Va attempted to claim subrogation rights, it is irrelevant here because the VA is proceeding under its independent indemnity right, governed entirely by federal law, see id., and unaffected by state deficiency judgment requirements. Thus, their lenders' failure to obtain deficiency judgments against them does not relieve plaintiffs of their independent indemnification obligations to the VA.

III.

In a separate line of argument, plaintiffs point to 38 C.F.R. § 36.4324(f), which provides that, if a lender is requested by the Va to preserve personal liability and fails to do so, that lender cannot recover on the VA's guaranty.[2] Plaintiffs maintain that the

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2 Section 36.4324(f) provides in relevant part:

The release of the personal liability of any

VA directed the lenders to preserve personal liability against them, that the lenders failed to do so by failing to secure deficiency judgments, and thus the VA's obligation was released. Any payment by the VA, reason plaintiffs, were therefore gratuitous and not chargeable to them. The plaintiffs rely on United States v. Davis, 961 F.2d 603 (7th Cir. 1992), appeal after remand, 34 F.3d 417 (7th Cir. 1994), cert denied, 115 S.Ct. 1360 (1995); and United States v. Church, 736 F.Supp. 1494 (N.D. Ind. 1990).

The VA does not assert that the Davis and Church cases were wrongly decided. However, we need not decide whether the rule of those cases should be followed by us because the record in this appeal does not support the application of that rule. We will assume, arguendo, the validity of

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obligor on a guaranteed or insured obligation resultant from the act or omission of any holder without the prior approval of the Secretary shall release the obligation of the Secretary as guarantor or insurer, except when such act or omission consists of . . . (2) an election and appropriate prosecution of legally available effective remedies with respect to the repossession or the liquidation of the security in any case . . . if holder shall have given such notice as required by § 36.4317 of this part [notice of intention to foreclose] and if, after receiving such notice, the Secretary shall have failed to notify the holder within 15 days to proceed in such manner as to effectively preserve the personal liability of the parties liable, or such of them as the Secretary indicates in such notice to the holder. . . .

the rule that the VA's right of indemnity can be extinguished if the lender has, contrary to the VA's instructions, permitted the right of subrogation to be lost, but the VA has nevertheless gratuitously reimbursed the lender under the terms of this guaranty. We agree with the position taken here by the VA that the factual predicate for the rule of the Davis and Church cases was not established in the district court.

In a letter from the VA to Talman Home Mortgage Corp. regarding Mr. Dixon's mortgage, the VA's concern was plainly with pursuit of a deficiency judgment against any transferees and not against Mr. Dixon. See Appellants' App. at 32. The record regarding Mr. Norwood's guaranty is less clear. The VA instructed the lender to "proceed in such a manner so as to preserve your rights in personam against those liable on the note so as to protect the Administrator's rights of subrogation as set out in 38 Code of Federal Regulations section 36.4323(a)." Id at 33. The letter continued: "If a deficiency judgment is required, we will notify you." Id. There is no evidence in the record, however, that any notice requiring the lender to procure a deficiency judgment against Mr. Norwood was ever sent or received.

Although the first quoted sentence of the VA's letter to Norwood's lender does lend some support to his position, we find the letter is insufficient to support a finding that the lender disregarded an instruction by the VA to

pursue a deficiency judgment. Instead, the second quoted sentence makes clear that the VA was not instructing the lender to pursue a deficiency judgment at that time. Because there is no evidence that the VA ever issued such an instruction, we conclude that the lender did not forfeit its rights under the guaranty agreement. consequently, the VA's reimbursement to the lender was not gratuitous, and Norwood's reliance on the rule of Davis and Church is unavailing.

We are persuaded that the record does not support the plaintiffs' interpretation of the undisputed facts. The VA's communications to the lenders did not give instructions or make a request to the lenders to preserve personal liability of the plaintiffs to them, and the VA's right of indemnity was not impaired.

IV.

Finally, plaintiff Norwood argues that, because his debt to the VA was discharged in bankruptcy, his loan availability under the Guaranty Program should be fully reinstated. We disagree.

A veteran loses his eligibility to have his previously used loan-guaranty entitlement restored where the VA has incurred an unreimbursed loss because of that veteran's transactions pursuant to the Guaranty Program. In Mr. Norwood's case, the VA calculated his eligibility according to the dictates of 38 U.S.C. § 3702(b), which provides in relevant party:

> In computing the aggregate amount of guaranty or insurance housing loan entitlement available to a veteran under this chapter, the Secretary may exclude the amount of guaranty or insurance housing loan entitlement used for any guarantee, insured, or direct loan, if --
>
> > (1)(A) The property which secured the loan has been disposed of by the veteran or has been destroyed by fire or other natural hazard; and
> >
> > (B) the loan has been repaid in full, or the Secretary has been released from liability as to the loan, or if the Secretary has suffered a loss on such loan, the loss has been paid in full. . . .

38 U.S.C. § 3702(b) (emphasis added). Because the loss suffered by the Secretary due to Mr. Norwood's default has not been repaid in full Mr. Norwood's present eligibility was reduced accordingly.

Contrary to Mr. Norwood's suggestion, the VA's position here is not in derogation of bankruptcy law and a "back door attempt to collect on a debt." See Reply Br. at 6-7. reduction of Mr. Norwood's eligibility for loan guaranty

is not an attempt to collect a discharged debt. It is a refusal to advance otherwise available benefits.

The amount the VA paid on behalf of Mr. Norwood is merely available to it for setoff against the amount of his original guaranty eligibility. The fact that Mr. Norwood is precluded from participating in the Guaranty Program in its full and unencumbered scope is not a debt that was discharged in bankruptcy. See Newman v. Veterans Admin. (In re Newman), 35 B.R. 97, 99 (Bankr. W.D.N.Y. 1983). The VA is correct in maintaining that it is not seeking to recover the amount of Mr. Norwood's debt, nor is it seeking to avoid the effect of his bankruptcy proceeding. The VA is not contending that Mr. Norwood is legally obligated to pay the discharged debt, and it does not seek indemnification from him. Mr. Norwood is simply not eligible for the full amount of guaranty benefits until the loss incurred by the VA is repaid.

As noted above, the district court ordered Mr. Norwood's eligibility to participate in the Guaranty Program to be withheld until payment was made in full. The VA acknowledges, however, that plaintiff is still entitled to loan guaranty benefits in the amount of $16,250. See Appellee's Br. at 28 N.10. To make this clear, the order of the direct court is MODIFIED to state that plaintiff Norwood's eligibility for loan guaranty benefits has not been eliminated and remains at $16,250. In all other respects, the judgment of the United States District court for the Western

District of Oklahoma is AFFIRMED.

APPENDIX B
FILED OCTOBER 12, 1994

IN THE UNITED STATES DISTRICT
COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

WILLIAM H. DIXON and ROGER L. NORWOOD, each as an individual and a representative of the class,	)	No.CIV-93-1924-W
Plaintiffs,	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

O R D E R

This matter comes before the Court on the Motion for Summary Judgment filed by plaintiffs William H. Dixon and roger L. Norwood and Cross-Motion for Summary Judgment filed by the defendant, United States of America, pursuant to Rule 56, F.R.Civ. P. the parties have stipulated to the facts and based upon these stipulations and the arguments and authorities submitted by the parties, the Court makes its determination.

The plaintiffs are veterans who purchased houses using their benefits under the Veterans Administration Guarantee Program. They defaulted on their payments and judicial foreclosure

proceedings were instituted by the mortgage holders. Neither Norwood's nor Dixon's mortgage holder sought a deficiency judgment.

On September 14, 1989, the Veterans Administration (VA) pursuant to the Application for Home Loan Guaranty executed by Norwood paid Norwood's mortgage holder the sum of $22,968.00. The Va then established an administrative debt against Norwood under title 38, section 36.4323(e) of the Code of Federal Regulations.[1] Norwood thereafter filed a petition in the United States Bankruptcy Court for the Western District of Oklahoma and this debt was discharged.[2]

1

Section 36.4323(e) provides that "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran."

2

The fact Norwood has discharged his debt to the VA in bankruptcy does not restore his eligibility for VA benefits. While the VA cannot affirmatively collect its debt from Norwood, the debt has not extinguished. 11 U.S.C. §524. The debt must be paid before Norwood is restored to full eligibility. 38 C.F.R. §36.4302(i).

On July 20, 1990, the Va pursuant to the Application for Home Loan Guaranty executed by Dixon paid Dixon's mortgage holder the sum of $27,750.00. The Va likewise established an administrative debt against Dixon under section 36,4323(e).[5]

The VA, in reliance on regulations promulgated by the Department of Veterans Affairs, has contended that it has the right to be indemnified by Norwood and Dixon for the amounts paid to their mortgage holders. The plaintiffs have argued that the VA's right of indemnification was extinguished in each case by the mortgage holders. The plaintiffs have argued that the VA's right of indemnification was extinguished in each case by the mortgage holder's failure to obtain a deficiency judgment under state law. In support of their argument, the plaintiffs have relied solely on the decision in Whitehead v. Derwinsky, 904 F.Ed 1362 (9th Cir. 1990). Whitehead however was expressly overruled by Carter v. Derwinski, 987 F.2d 611 (9th Cir. 1993), wherein the United States court of Appeals for the Ninth Circuit held that the VA has the right to both subrogation and indemnification and that "[r]egardless of the method by which a lender proceeds against a defaulting

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5

The defendant has filed a counterclaim against Dixon to recover the amount the VA paid to Dixon's mortgage holder plus interest and costs.

veteran--even when it does so at the VA's direction--the VA always possesses a right of indemnity against the veteran for the amount of guarantee paid to the lender." Id. at 616.

Because there are no conflicting factual issues and because the defendant has demonstrated under extant case law that it is entitled to judgment as a matter of law on both the plaintiffs' claims and its counterclaim,[6] the Court.

(1) GRANTS the defendant's Cross-Motion for Summary Judgment filed on September 30, 1994;

(2) DENIES the Plaintiffs' Motion for Summary Judgment filed on September 15, 1994; and

(3) DIRECTS the defendant to prepare and submit a judgment for this Court's approval within seven (7) days.

ENTER this 12th day of October, 1994.

/S/
LEE R. WEST
UNITED STATES DISTRICT JUDGE

Entered in Judgment Docket
on 10/12/94

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renders moot all class
issues.

APPENDIX C
FILED NOVEMBER 15, 1994

IN THE UNITED STATES DISTRICT
COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

WILLIAM H. DIXON and ROGER L. NORWOOD, each as an individual and a representative of the class,	)	No.CIV-93-1924-W
Plaintiffs,	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

O R D E R

This matter came on before the Court on the Motion for Summary Judgment filed by plaintiffs, William H. Dixon and Roger L. Norwood and Cross-Motion for Summary Judgment filed by the defendant, United States of America, pursuant to Rule 56, F.R.Civ. P. The parties had stipulated to the facts and based upon such stipulation and the authorities cited by the parties, the Court, on October 12, 1994, determined that the defendant was entitled to judgment as a matter of law on the plaintiffs' claims as well as the defendant's counterclaim

The matter now comes before the Court on the plaintiffs' Motion to Reconsider

and the defendant's response thereto. Upon review of these submissions, the court finds the plaintiffs have advanced no argument or authority that warrants reconsideration of its Order of October 12, 1994. Accordingly, the Court.

(1) DENIES the plaintiffs' Motion to Reconsider filed on October 18, 1994; and

(2) DIRECTS that judgment issue forthwith.

ENTER this 15th day of November, 1994.

/S/
LEE R. WEST
UNITED STATES DISTRICT JUDGE

Entered in Judgment Docket
on 11-15-94

(2)

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-1234

In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM H. DIXON AND ROGER L. NORWOOD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

1. Whether the United States has a right of indemnification against petitioners for amounts paid by the government pursuant to the Department of Veterans Affairs Home Loan Guaranty Program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 68 F.3d 1253. The opinion of the district court (Pet. App. 12a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1995. The petition for a writ of certiorari was filed on January 22, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) provides housing assistance to veterans by guaranteeing home loans made by private lenders pursuant to the

Home Loan Guaranty Program (Guaranty Program). Title III of the Serviceman's Readjustment Act of 1944, ch. 268, 58 Stat. 291, 38 U.S.C. 3701-3733.[1] If a veteran defaults on loan payments, the holder of the note may foreclose on the property in accordance with the law of the State in which the property is located. See 38 U.S.C. 3720(a)(6); 38 C.F.R. 36.4319, 36.4320. If the holder forecloses in accordance with the VA's instructions and a deficiency remains after the sale of the property, the VA must reimburse the holder up to the amount of the guaranty. 38 C.F.R. 36.4321.

The VA's regulations provide two alternative courses by which the Department may recover the amount paid on the guaranty. 38 C.F.R. 36.4323(a) and (e). First, the VA becomes subrogated to the rights of the holder and can pursue any causes of action the holder might have had. 38 C.F.R. 36.4323(a). Second, the VA may assert a right of indemnification against the veteran. The regulatory provision governing indemnity states that "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran." 38 C.F.R. 36.4323(e).

2. Petitioners are eligible veterans who purchased homes using mortgage guaranties pursuant to the VA's Guaranty Program. Pet. App. 2a. Both petitioners' mortgages went into default and were foreclosed pursuant to Oklahoma law. *Ibid.* Neither of the lenders involved sought a deficiency judgment

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[1] Those provisions were previously codified at 38 U.S.C. 1801-1833 (1988).

against petitioners. *Ibid.*[2] Pursuant to the guaranty agreements, the VA paid approximately $50,000 to petitioners' lenders, and established administrative debts against both petitioners in the amount of the payments made. *Ibid.*

3. Petitioners filed suit, seeking to enjoin the United States from collecting on their debts to the VA pursuant to the Guaranty Program. They contended that "the VA's right of indemnification was extinguished in each case by the mortgage holder's failure to obtain a deficiency judgment under state law." Pet. App. 14a. The district court granted the United States' motion for summary judgment. Relying on the Ninth Circuit's decision in *Carter* v. *Derwinski*, 987 F.2d 611 (en banc), cert. denied, 114 S. Ct. 78 (1993), the court held that "the VA has the right to both subrogation and indemnification and that '[r]egardless of the method by which a lender proceeds against a defaulting veteran * * * the VA always possesses a right of indemnity against the veteran for the amount of guarantee paid to the lender.'" Pet. App. 14a-15a (quoting *Carter*, 987 F.2d at 616).

4. The court of appeals affirmed. Pet. App. 1a-11a. The court acknowledged that the lenders' failure to obtain deficiency judgments against petitioners precluded the VA from asserting a right of subrogation. *Id.* at 4a.[3] The court held, however, that the VA had

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[2] Under Oklahoma law, a motion for a deficiency judgment must be made within 90 days after a foreclosure sale. Pet. App. 4a n.1.

[3] The court explained that "if the lenders' rights to a deficiency judgment against the veterans fail, the VA's rights through subrogation fail as well. * * * Because foreclosures must be done according to state law, the lenders here needed to

"an independent contractual right of indemnity against the [petitioners]." *Id.* at 4a-5a. Although "adherence to Oklahoma law * * * would have been crucial had the VA attempted to claim subrogation rights," the court explained, "it is irrelevant here because the VA is proceeding under its independent indemnity right, governed entirely by federal law, and unaffected by state deficiency judgment requirements." *Id.* at 5a (citation omitted).

ARGUMENT

1. The regulations governing the Home Loan Guaranty Program provide the VA with two independent avenues for seeking reimbursement for guaranty payments. In exercising its right of subrogation, see 38 C.F.R. 36.4323(a), the VA stands in the shoes of the lender, and its rights are therefore governed by state law. See Pet. App. 4a. In addition, the VA has an independent right of indemnification for "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured" under the Guaranty Program. 38 C.F.R. 36.4323(e). The VA's right to indemnity arises under federal law and functions "as part of a nation-wide federal program that should not be affected by state law." *Boley* v. *Brown*, 10 F.3d 218, 222 (4th Cir. 1993). That program "was intended to provide the whole and exclusive source of protection of the interests of the Veterans' Administration as guarantor and was, to this extent, meant to displace inconsistent state law."

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have secured deficiency judgments under Oklahoma law to preserve rights against [petitioners] to which the VA could later be subrogated. Because no deficiency judgments were obtained here, the VA has no subrogation rights against [petitioners]." Pet. App. 4a (citation and footnote omitted).

United States v. *Shimer*, 367 U.S. 374, 381 (1961) (footnote omitted).

In *Shimer*, a veteran incurred a debt to the VA as a result of his default on a mortgage. He argued that the mortgage holder's noncompliance with state law requirements for obtaining a deficiency judgment precluded the VA's claim for indemnification for sums expended pursuant to the guaranty. This Court rejected that contention. Notwithstanding the mortgage holder's failure to follow the procedures set out by state law for obtaining a deficiency judgment, the Court held, the VA remained obligated to serve as guarantor for the loan, and it possessed an independent right of indemnification for payments made as guarantor. 367 U.S. at 386-387.

The veteran in *Shimer* also argued that, since he owed no debt to the mortgagee at the time the VA paid its guaranty, the agency's payment was not made "on account of the liabilities of any veteran" within the meaning of the governing regulation. 367 U.S. at 387 (quoting 38 C.F.R. 36.4323(e)). The Court found that position "untenable" and stated that Section 36.4323(e)

> is merely declaratory of a surety's customary right of indemnity for amounts paid pursuant to an obligation of the guarantor assumed with the consent of the principal. Restatement of the Law of Security, § 104. This right is in general unaffected by defenses of the principal which are not available to the guarantor. The Regulation certainly indicates no purpose to depart from the general rule in the case of guaranties by the Veterans' Administration.

367 U.S. at 387-388 (footnotes and citations omitted).

This Court's decision in *Shimer* makes clear that the VA possesses an independent right of indemnification under the Home Loan Guaranty Program; the agency is not limited to a cause of action based on subrogation, and its right to recover from the veteran is not dependent on the veteran's liability to the mortgagee. *Shimer* also makes clear that any payment properly made pursuant to the VA's legal obligations as guarantor is a payment made "on account of the liabilities of" the veteran within the meaning of 38 C.F.R. 36.4323(e), even if the veteran owes no debt to the mortgagee at the time the payment is made. Finally, the decision establishes that the VA's right to indemnification from the borrower is governed by federal rather than state law.

Applying *Shimer*, four courts of appeals (in addition to the Tenth Circuit in the instant case) have concluded that state law restrictions on deficiency judgments do not limit the VA's right to seek indemnification for payments made in connection with the Guaranty Program. See *United States* v. *Davis*, 961 F.2d 603, 610 (7th Cir. 1992) ("We believe that *Shimer* is directly applicable to this case and therefore choose to follow its lead in sustaining the VA's independent federal indemnity right."); *Vail* v. *Derwinski*, 946 F.2d 589, 592 n.7 (8th Cir. 1991) ("*Shimer* makes clear that indemnity is an independent remedy."); *Carter* v. *Derwinski*, 987 F.2d 611, 615-617 (9th Cir.) (en banc) (VA's indemnification rights stand "on equal footing with the right of subrogation"; state law requirements for obtaining a deficiency judgment "are simply irrelevant" to the VA's rights of indemnification because the "federal indemnity right doesn't depend on state foreclosure or deficiency law"), cert. denied, 114 S. Ct. 78 (1993); *Boley* v. *Brown*, 10 F.3d at

221-222 (VA's failure to satisfy state law requirements for deficiency judgments did not affect its right to indemnification for loan guaranty payments). Although a panel of the Ninth Circuit reached a contrary result in *Whitehead* v. *Derwinski*, 904 F.2d 1362 (1990), its decision was subsequently overruled by the en banc court in *Carter*. See 987 F.2d at 616. In the absence of a circuit conflict, the court of appeals' decision in this case does not warrant further review.

2. The only argument offered in the petition to support review of the court of appeals' decision is the contention that the VA did not protect its rights under Oklahoma law. See Pet. 12-13. As the court of appeals made clear, however, any state law barriers to the VA's subrogation rights were irrelevant to the VA's indemnification rights, the extent of which are defined by federal law. Petitioners' arguments regarding the effect of Oklahoma law are therefore beside the point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996